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National Report: The Law of Surrogate Motherhood in the United States

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The Law of Surrogate Motherhood in the United States†

The law of surrogate motherhood in the United States is in a state of flux and confusion. States have widely differing laws, some enforcing surrogacy contracts, some banning them entirely, and some allowing them under certain circumstances. Many states have no laws regarding surrogacy contracts at all. No single statutory regime has won widespread acceptance. As a result, courts are often left to decide parenthood disputes arising from these contracts, and employ a range of theories by which to do so: intent, contract, genetics, gestation and, rarely, best interests of the child.

INTRODUCTION

The law of surrogate motherhood in the United States varies from state to state, and ranges from banning surrogacy contracts to enforcing them. This report proceeds as follows: Part One traces the history of surrogacy in the United States, beginning with the slave-holding South, where African American slave women arguably served as surrogates for their masters, discusses the first important surrogacy cases, and outlines the scholarly response to the new technology. Part Two presents the various legal theories courts use to decide parenthood disputes arising from surrogacy contracts, Part Three analyzes the Constitutional concerns these cases give rise to, and Part Four outlines the model statutes drafted to address surrogacy. Finally, Part Five examines the case law on liability of surrogacy brokers and clinics arising from these contracts.

I. AMERICAN HISTORY OF SURROGACY

Surrogacy is not just a late twentieth century phenomenon in American history. Arguably, all African American slave women before the Civil War were surrogate mothers for their owners, gestating and giving birth to children who would not belong to them but become the property of their masters. Indeed, in one famous case, a slave woman who had been kidnapped from Illinois and sold into

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slavery in Mississippi, sued and won, first her own freedom and then custody of her teenage daughter.\(^1\) This association with slavery, coupled with the fact that many African American women are seen as economically vulnerable and thus susceptible to exploitation, has made many civil rights advocates and scholars of race theory leery of surrogacy contracts.\(^2\)

There are now two types of surrogacy: full surrogacy and partial surrogacy. Both use the technology of *in vitro fertilization*, which became available in 1978. Partial surrogacy was the first of the two procedures to be medically possible: it involves the implantation of the surrogate with the sperm of the biological father, but uses the surrogate mother's eggs to form the pregnancy. This earlier type of surrogacy, because it used the surrogate's eggs, created the biological connection which made it relatively easy for courts to determine that the birth mother was also the legal mother. Such reasoning led to decisions such as the *Baby M.* case, discussed below.

In the early seventies, a California couple placed an ad in a local newspaper seeking a woman to bear a child for them through artificial insemination. A woman answered the ad and agreed to bear the couple's child in return for a fee of $7,000 and a $3000 in legal and medical expenses. When word about the arrangement got out, a Michigan couple approached a local lawyer, Noel Keane, who was to become known as the father of surrogate motherhood, and asked him to help them find a surrogate and negotiate a similar deal for them. To figure out the legal parameters of the law in this area, Keane wrote inquiries to the State Attorney General, a judge and a doctor. Only the judge responded, expressing the opinion that having a surrogate agree to be inseminated, carry a baby to term and give up her parental rights to the child upon birth in favor of the contracting couple was perfectly legal under Michigan law, as was the payment of the surrogate's expenses, but that payment of a fee for the service of gestating the child would be considered illegal.

Frustrated by the ban on compensation to surrogates, Keane eventually began sending couples to Kentucky, which had no such prohibition. Keane's work served to make surrogacy widely known and popular for infertile couples.\(^3\)

Full surrogacy, also called gestational surrogacy, by contrast to partial surrogacy, occurs when a surrogate is implanted with the sperm of the biological father and the eggs of the biological mother; i.e., eliminating any biological relationship between the surrogate

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2. *Id.*
mother and the child. This variant on surrogacy eliminated the birth mother/genetic mother equation, and led to litigation disputing the child’s parentage. Full surrogacy, although more expensive, is treated more favorably in some jurisdictions, leading many fertility clinics to offer it as the standard form. On the other hand, some urge that surrogacy contracts be treated like other contracts, with deference to the intent of the parties, and argue that they offer the opportunity for gender-neutral parentage laws. 4

The Baby M. case first brought widespread attention to the procedure and the possible legal complications that it could entail. 5 The case arose from a contract entered into in February, 1985 by William Stern and Mary Beth and Richard Whitehead, which recited that Whitehead, in return for a $10,000 fee, agreed to be inseminated with William’s sperm, become pregnant, bring the child to term, bear it, and then relinquish parental rights and deliver the child to the Sterns, whereupon Elizabeth Stern, William’s wife would formally adopt it. The contract also recited that the Sterns would pay a $7,500 fee to the Infertility Clinic of New York, which had arranged for the surrogacy. Elizabeth Stern, who was not a party to the contract, had been diagnosed with multiple sclerosis, which she had been told could make a pregnancy dangerous and even life threatening. Both Sterns very much wanted children, however: at first they considered adoption, but became discouraged at the delays involved, and the possible difficulties they might encounter due to the difference in their ages and religious backgrounds. Because of these concerns, they responded to an ad for the Infertility Clinic of New York, an ad to which Whitehead also responded.

The insemination was successful; Whitehead became pregnant and gave birth to a baby girl on March 27, 1986. On March 30th, she turned the baby over to the Whiteheads at their home. Whitehead began to have second thoughts, however: she appeared at the Stern’s home the next evening severely distraught, begging to take the child for one week after which she promised to surrender her. The Sterns, concerned that Whitehead might commit suicide and taking her at her word, allowed her to take the child. It was only four months later, however, that the Sterns regained custody of the baby, having had her forcibly removed from Whitehead’s parents’ house in Florida where she was living with the Whiteheads. This required the filing of numerous complaints and orders and finally the intervention of Florida police, who removed the baby from the grandparent’s home and had her delivered to New Jersey. The Sterns brought a complaint seeking that the surrogacy contract be enforced, i.e., that the child be

permanently placed with them, that Whitehead relinquish her parental rights, and that Mrs. Stern be allowed to adopt the child. The trial court found the surrogacy contract to be valid, and ordered compliance. A large part of the basis for the trial court's decision was based on the view that custody with the Sterns was in the child's best interests. Whitehead appealed.

The New Jersey Supreme Court held the surrogacy contract to be invalid for conflicting with both the laws and the public policy of the state. The promise to surrender the child, made before birth or even conception, the court stated, directly contradicted New Jersey adoption law, which allows for surrender only after the birth of the child, and after the mother is offered counseling. The contract also conflicted with state laws prohibiting the use of money in connection with adoption, laws requiring proof of parental unfitness or voluntary surrender before the termination of parental rights, and laws making surrender revocable in adoption proceedings. Most serious, the court found, was the payment involved: it referred to the "evils inherent in baby bartering," including the lack of knowledge of the adoptive parents' fitness and the financial pressure which might make the birth mother's consent less than voluntary. Centrally, the court noted that the contract abrogated settled law to the effect that the child's best interests should determine custody, and that the rights of each natural parent of a child are equal to those of the other. Ultimately, the court concluded that Whitehead's "consent was irrelevant," because "there are, in a civilized society, some things that money cannot buy."

The court also rejected Mr. Stern's Constitutional claim that custody of the child was his right as part of the right to privacy, the right to procreate, and the right to the companionship of one's child, all flowing from the Fourteenth Amendment, the Ninth Amendment and the "penumbral" surrounding the Bill of Rights. It observed that his rights in this regard did not outweigh Whitehead's same rights stemming from the same sources, and could not be understood to override them. The Court also disagreed with Mr. Stern's equal protection claim, based on a New Jersey statute that gave fatherhood rights to a husband over a child resulting from his wife's insemination by a sperm donation to which he had consented. It refused to see the situations of a sperm donor and a surrogate mother as parallel: on the basis of the time involved in donating sperm, as opposed to that invested in a nine-month pregnancy, at the very least, the Court stated that the two were not analogous. The Court did, however, recognize Whitehead's Constitutional claim to the companionship of her child, although it determined that in light of the rest of its decision, this claim was moot. Ultimately, the Court found that custody in the Sterns served the child's best interests, but ruled that Whitehead
should be granted visitation, and remanded to the trial court for a finding as to how and when that visitation should proceed.

II. LEGAL THEORIES FOR RESOLVING PARENTHOOD DISPUTES ARISING FROM SURROGACY CONTRACTS

The Baby M case was a catalyst for many lawmakers to urge various legislative regulation of surrogacy, although there was a wide spectrum of views as to what kind of regime was called for, ranging from calls to criminalize the practice to urgings to protect such arrangements. A proposed Uniform law for the United States offered two alternative approaches, one banning surrogacy, the other regulating it. State laws vary. Some ban it entirely, others regulate it, and a few simply recognize the intended parents. Radhika Rao categorizes the varying approaches into four types: prohibition, inaction, status regulation, and contractual ordering. Some states prohibit surrogacy contracts, whether compensated or not, and impose both civil and criminal penalties on anyone taking a part in such a contract. An example is the Arizona statute, which states that a surrogate is “the legal mother of a child born as the result of a surrogate parentage contract and is entitled to custody of that child.”

Despite the fact that the Arizona Appellate Court ruled this statute unconstitutional because it denied the genetic mother equal protection, it has not been repealed. Other states ban enforcement of surrogacy contracts, thereby presumably also making the surrogate the legal mother of the child.

States that take what Rao calls the “inaction” approach have declined to ban surrogacy contracts by statute, but allow courts to nullify them as against public policy. States that have taken a more active approach enforce the contracts through general contract rules. Several of the states that do allow surrogacy refuse to allow the surrogate to be compensated for her services, although it is important to note that these states do allow the surrogate to be compensated for her expenses, including legal, medical and counseling costs (Illinois is the only state that expressly allows a fee for services). Six states refuse to enforce surrogacy contracts when the surrogate is compensated for her services. Five states have explicitly made only uncompensated surrogacy contracts legal. This ban on compensation for surrogacy services effectively bans surrogacy contracts

altogether, since compensated contracts are by far the more prevalent. Finally, six states ban payment to intermediaries who find a willing surrogate for couples in need. The statutory regimes in the remaining states leave the legal status of surrogacy contracts unclear. Many have simply failed to pass laws addressing the issue. Others have partial statutory regimes that leave unanswered whether surrogacy contracts involving compensation will be enforced, or whether surrogacy contracts of any kind will be enforced. Many states simply have no laws addressing the enforceability or legality of surrogacy contracts at all. In these states, couples must enter surrogacy contracts at the risk of a court later determining that the agreement was unenforceable or illegal based on Constitutional or public policy grounds.

The confused state of the law boils down to two questions: will the surrogacy contract be enforced—that is, will the surrogate be forced to comply with its requirement that she relinquish parental rights—and may the surrogate receive compensation other than coverage for the expenses associated with the gestation? Following are several different theories courts use when answering these questions.

A. Parenthood by Intent

The second important surrogacy case, and the one that established the theory of parenthood by intent, was Johnson v. Calvert. Here, the court faced a case of complete surrogacy: the surrogate, Anna Johnson, contracted with Mark and Crispina Calvert to be implanted with Mark's sperm and Crispina's egg, and to carry their baby to term (Crispina had had a hysterectomy but was still capable of producing eggs). In return for three payments totaling $10,000, and a $200,000 life insurance policy Anna agreed to relinquish all parental rights to the child. In the months succeeding Anna's conception, however, "relations deteriorated between the two sides." Ultimately, Anna wrote to the Calverts demanding the final payment (which under the contract was not due till after the child's birth) and threatening that she would not relinquish the child unless they complied. The Calverts went to court and sought a declaration that they were the parents of the child; Johnson filed a petition to be declared the mother, and the cases were consolidated. The trial court ruled

13. Texas and Arkansas.
16. 5 Cal. 4th 84 (1993).
17. Id. at 87.
that the Calverts were the "genetic, biological and natural father and mother," found the contract enforceable, and denied Anna's claim to maternity. Anna appealed.

The Supreme Court of California resolved the dilemma by looking to the intent of the parties in signing the contract. Conceding that under the Uniform Parentage Act, both gestation and genetic ties can give rise to a presumption of motherhood, the Court determined that "when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."\(^\text{18}\) Reasoning that the child would not have been born but for the intention of the Calverts, the Court found that intent to be the primary determinant of parentage, and also observed that finding parentage in the people who had chosen to bring the child into being was also in the best interests of the child. In taking the parties' intentions into account, the Court declined to find such contracts against public policy, although it did not pronounce them endorsed by the policy of the state of California. Taking a different tack from the Baby M. Court, this Court also rejected Anna's argument that the contract violated state adoption policy and state laws regarding termination of parental rights: it found surrogacy distinguishable in both cases because Anna was not the genetic mother and because the payments she received were for her services in gestating the child, not for giving up her parental rights. To the assertion that surrogacy contracts exploit women of low economic status, the Court replied that there was no evidence that these contracts caused any more harm in this respect than other low-paying work in which poor women might be employed. To the contrary, it found that the assumption that a woman could not choose to enter into such a contract to be outdated, patronizing and redolent of "the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law." Finally, to the Constitutional argument that Anna was denied her right to privacy, substantive due process and procreative freedom, the Court responded that all of these rights were predicated on Anna being the child's mother under California law, which it had already determined she was not.

California continues to apply the intent test. In 1998, in \textit{In re Marriage of Buzzanca}, a California Court of Appeal found that a father who had agreed to a surrogacy arrangement was the resulting child's natural father and obligated for child support despite the fact that the couple had divorced, the wife had agreed to assume responsibility for the child's care, the surrogacy contract had not been signed at the time of implantation and conception, and the father, not hav-

\(^{18}\) \textit{Id.} at 500.
ing contributed the sperm, had no genetic relationship to the child.\textsuperscript{19}

The Court applied the settled body of law under the Uniform Parentage Act that applied to artificial insemination: when a husband consents to his wife's \textit{in vitro fertilization}, he is deemed the father of the child, because the medical procedure which produced the child was set in motion and intended by the putative parents. The husband's consent makes him "directly responsible" for the child's existence, and he knows that "such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport." This Court bolstered its decision with the common law doctrine of estoppel, noting the doctrine's distaste for inconsistent actions like "consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility."\textsuperscript{20} The Court likewise found that the wife was the child's natural mother.

The Court insisted that it was not ruling on the public policy aspects of surrogacy contracts—in fact, it was adamant that it was not concerned with the enforceability of the contract at all. Rather, it said, it was determining parenthood with reference to the "consequences of those agreements as acts which caused the birth of a child."\textsuperscript{21}

Other jurisdictions also hold that intent manifested in a surrogacy agreement offers a third way—besides procreation and adoption—that parenthood can be established. For example, Nevada law allows for surrogacy contracts and states that a "person identified as an intended parent in a [surrogacy] contract must be treated in law as a natural parent under all circumstances."\textsuperscript{22} Similarly, Arkansas law provides that a child born to surrogate mother is presumed to be the child of the biological father and the intended mother as long as the father is married.\textsuperscript{23}

The intent theory has received its share of criticism, based primarily on the lack of weight it gives to the role of gestation and genetics in determining parenthood, and also because intent is not a criterion for establishing legal parenthood in cases of coital conception.\textsuperscript{24} Commentators have expressed the concern that if intent is given a dominant role in creating parental obligations, it will make it easier for parents of coitally conceived children to avoid their responsibilities toward their offspring.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{19} 61 Cal. App.4th 1410, 72 Cal.Rptr 2d 280 (1998).
\item \textsuperscript{20} \textit{Id.} at 1420.
\item \textsuperscript{21} \textit{Id.} at 1423.
\item \textsuperscript{22} Nev. Rev. Stat. 126.045 (2001).
\item \textsuperscript{23} Ark. Code Ann. §9-10-201 (Michie 2002).
\item \textsuperscript{24} Note, "Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements," 51 Drake L. Rev. 605, 624 (2003).
\item \textsuperscript{25} Note, "Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements," 51 Drake L. Rev. 605, 624 (2003).
\end{itemize}
B. Parenthood by Contract

Other courts uphold surrogacy agreements on the contract principles. The Minnesota Court of Appeals, for example, applied traditional contract analysis to a surrogacy contract that the surrogate claimed, after childbirth, was invalid. It affirmed the District Court's finding that the parties had entered into a valid agreement that reflected the intentions of the parties, had not been coerced, and did not contravene state public policy (noting that, while Minnesota had no laws sanctioning such agreements, it also lacked laws against them, and had other laws protecting the rights of those who used assisted reproduction technologies).

C. Parenthood by Genes

Other courts enforce surrogacy contracts under the theory that the parents are the ones with a genetic tie to the child. For example, in J. F. v. D. B., the Ohio Court of Appeals ruled that a surrogacy contract did not violate public policy as a "private agreement to forego parental rights" because the surrogate had no parental rights to forego: under Ohio law, "the individuals who provide the genes of that child are the natural parents." Similarly, Clark v. Belsito ruled that "the law requires that [those who] provided the child with its genetics... must be designated as the legal and natural parents." There is, however, a line of cases holding that genes alone do not constitute parentage when there is a conflicting interest with someone else who has claimed a parent-child relationship. These cases seem in fact to be based on the assumption that genes along with intent create parenthood when the only conflicting interest is one that is purely biological. Another case involving a fertility clinic mix up used the genetic relationship test in a similar manner: in Perry-Rogers v. Fasano, two couples began IVF treatments at the same clinic, and the clinic accidentally implanted both embryos in Ms. Fasano. Ms. Fasano gave birth to two children of different races, and she and her husband insisted on visitation rights as a condition of relinquishing custody of the non genetically related child. The Court relied on genetics to determine that Ms. Fasano was a mere gestational carrier for the child to whom she was not related, and therefore that she had no standing to seek visitation. The Court's emphasis on genetics, however, served to carry out the parties' original intentions, and thus can hardly be seen as relying on genetic ties alone.

Criticism of the genetic contribution test arises from the inconsistency of its results—for example, if the commissioning couple uses a donor ovum for implantation in the surrogate, may the egg donor make a claim for parenthood?\(^\text{30}\) In addition, the genetic test is inconsistent with most states’ laws denying a legal claim to paternity to sperm donors.

**D. Parenthood by Gestation**

State statutes that declare surrogacy contracts void\(^\text{31}\) in effect employ the doctrine of motherhood by gestation, refusing to grant a commissioning mother parental rights over the objection of the gestational mother. This approach employs the ancient common law presumption that the woman who gives birth is the mother, and also recognizes the bond established during the nine months of pregnancy. The flaw many commentators note in this theory is that it interferes with private ordering and the right to enter voluntarily into contracts, as well as invading the constitutionally protected area of privacy to make decisions about reproduction and child rearing.

As a corollary to the above decisions enforcing surrogacy contracts, some courts have found that a surrogate lacks standing to pursue custody either as the legal parent or as a caretaker *in loco parentis*. The Superior Court of Pennsylvania ruled that a surrogate who removed triplets from the hospital without permission from the intended parents was a “third party” in relation to the child and the child’s biological parents, and thus could not establish *in loco parentis* status in defiance of the natural parents’ wishes.\(^\text{32}\) Nor could she establish the status of legal parent, lacking any biological connection to the child, and thus did not have standing on this basis either.

**E. Best Interests of the Child Test**

Very few courts use the Best Interests of the Child Test in surrogacy cases, but the first surrogacy case to reach an appellate court in California did in fact apply it.\(^\text{33}\) The Court declined to rule on the validity of the contract itself because “the state’s paramount interest in the [child’s] welfare overrides its interest in deterring illegal conduct.”\(^\text{34}\) The dissent in *Johnson v. Calvert* made the same point: Justice Kennard argued that this principle of family law should be controlling in the absence of a legislative determination about the legitimacy of such contracts. The *Calvert* majority held that in a


\(^{31}\) See, e.g., North Dakota and Arizona.


\(^{34}\) *Id.* at 25.
determination of parentage the best interest standard did not apply because "such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede and should not be dictated by eventual custody decisions."

Succeeding California cases have followed this holding. A Pennsylvania court, by contrast, used the Best Interests test to make a custody decision between the surrogate and the biological father. While it was true that in this case the surrogate had been granted in loco parentis status due to having housed and cared for the children from birth, she had taken the children from the hospital against the biological father's wishes, an action that other courts would have found merely to be unlawful. The Court went on to determine, based on the in loco parentis determination, that custody with the surrogate served the children's best interests.

F. Declaratory Actions to Establish Parenthood

A strategy parties to surrogacy contracts have employed increasingly over the past few years is to ask a court for a determination of parentage before the child is born to the surrogate. Some courts have complied with these requests and others have not. In cases in which the petition is unopposed, a court's decision can be based on a variety of factors, but is generally favorable. For example, in In re Roberto d. B., the Court of Appeals of Maryland decided that allowing fathers to disclaim parentage—as did a Maryland statute regarding sperm donors—while denying the right to surrogate mothers violated the state's Equal Rights Amendment. Other courts have been equally willing to issue orders amending birth certificates. Some courts grant these orders on the basis of genetics: the Ohio Supreme Court, for example, granted such an order on the basis that Ohio law deemed the parents of the child to be those who "provide the genetic imprint for the child." Such orders may conflict with state adoption laws, which require a waiting period after the child's birth before the birth mother can relinquish parental rights: a court in Massachusetts refused to grant such an order, ruling that the couple had to wait the statutorily mandated period after the birth. The Supreme Judicial Court, however, reversed, deciding that the probate judge had equita-
ble jurisdiction to enter a pre-birth parentage order, and noting the
dangers of delays in establishing legal parenthood: possible delays in
medical treatment, problems with inheritance, and custody dis-
putes. 41 Other courts, however, have insisted on the mandatory
waiting period. 42

G. Gay and Lesbian Couples

Gay and lesbian couples use surrogacy as a way to have children
with a genetic and gestational tie to at least one partner. Problems
arise if the couple then separates, sometimes leading to court deter-
minations of parental rights: at that point, it is possible to see the
gestational carrier as a surrogate for the other partner. Based on the
above case law, courts should look at the non-genetically related part-
tner as having established a parent child relationship through intent
and actions, but courts sometimes treat these cases differently, prob-
ably because of bias against same sex couples. For example, in
Wakeman v. Dixon, a Florida District Court of Appeals denied a same
sex partner legal parent status of a child the other had gestated after
a sperm donation, despite the fact that the couple had executed co-
parenting agreements and the sperm donor had relinquished paren-
tal rights to both of the women as co-parents. 43 The Court reasoned
that the non-gestational partner was not a parent, analogizing her
position to that of a sperm donor who had no parental rights, and
found that granting her parental status would violate the Florida
Constitution's strong privacy protections. The case seems badly rea-
soned and ill fitted to the ample precedent that examines intent as
well as biology and genetics to determine parental status, and
prejudice against same sex couple may unfortunately account for this
result. A California case that found a same sex partner liable for child
support does little to reassure on this point: in Elisa B. v. Superior
Court, a former same sex partner denied being a legal parent to twins
born to the other partner during the relationship, despite an agree-
ment that each woman would raise the children as her own. 44 The
custodial mother filed for state support, and the state brought an ac-
tion to recover child support from the defendant. The issue of state
support seems to have been dispositive in this case, given the strong
policy against allowing children to become public charges, and it may
not set precedent for determining same sex non-biological parenthood
where public monies are not an issue.

Similar cases have come out differently in different jurisdictions,
however. For example, in Miller-Jenkins v. Miller-Jenkins, the custo-

43. 921 So. 2d 669, 669-70 (Fla. Dis. Ct. of App. 2006).
44. 117 P. 3d 660, 663 (Cal. 2005).
dial and gestational parent appealed a decision of the Vermont Family Court that 1): found both her and her ex-partner to be the legal parents of their child and granted her ex-partner visitation rights; 2): refused to give Full Faith and Credit to a Virginia Court order contrary to the Vermont decree; and 3): issued an order of contempt for her failure to abide by the Vermont Court's order granting the non-custodial parent visitation.\(^{45}\) To the custodial parent's claim that biology controlled the determination of parental rights, the Vermont Supreme Court responded that such a rule would deprive a child born of artificial insemination of a second parent, and observed that, when social mores change, "governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment," and that it made no sense to use outmoded statutes to "deny the children of same sex partners . . . the security of a legally recognized relationship with their second parent."\(^{46}\) The Court relied on consent and intent in finding the non-custodial parent to have parental rights. Both partners intended to become parents and raised the child together; the gestational mother treated her partner as the child's parent.

III. CONSTITUTIONAL ISSUES

The main Constitutional arguments for protection of surrogacy contracts is that it is part of the right to privacy under the Fifth Amendment, the penumbra to the Bill of Rights, and the Fourteenth Amendment. Proponents of this line of argument assert that the right to privacy, which has been held to include the right to make marital and procreative choices, the right to raise one's children as one sees fit, among other things, also encompasses the right to hire a surrogate mother to conceive a child. For example, Lawrence Gostin has argued that surrogacy arrangements "deserve Constitutional protection because of the private relationships and procreative intention of the parties, the woman's control over her own body, and the right of genetic parents to association with their child."\(^{47}\) Likewise, the surrogate has the right to choose to undergo artificial insemination, regardless of who will be the legal parent to the child.

The reverse Constitutional argument is that, because of her privacy right, the surrogate cannot waive the right to the child she carries, and that these rights trump the rights of the intended parents if the surrogate should change her mind at the birth of the child. This argument, in turn, is countered with the assertion that the surrogate has chosen to waive her Constitutional rights by freely and

\(^{45}\) 912 A.2d 951, 955 (Vt. 2006).
\(^{46}\) Id. at 968.
knowingly entering into the contract. Further, it can be argued, that those with the genetic tie to the child have a right to parentage that is superior to that of the carrier who has no such tie.

A Fourteenth Amendment argument can also be made on Equal Protection grounds. State laws do not usually ban artificial insemination when the man is sterile; thus, banning surrogacy, the remedy when the woman is sterile or otherwise unable to gestate a child, discriminates based on sex. The counterargument is that gestation is substantively different from artificial insemination in that the burden it places on the donating party, and thus justifies disparate treatment.

IV. STATUTORY REGIMES

A. Revised Uniform Parentage Act

In 1988, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Status of Children of Assisted Conception Act (USCACA or “the Act”), which, because the commissioners were unable to reach consensus on policy regarding surrogacy contracts, offered two alternative provisions regarding their validity. Option A stated that such contracts were valid if they were first approved by a court, while Option B provided that such contracts were void. USCACA used the term “surrogate” as a way of limiting the carrier’s maternal status. This is problematic, however, because, though not genetically related to the child, the carrier does perform a vital maternal role in gestating and bearing the child.

USCACA blends contract law and family law; it works to protect the children of assisted reproduction while also allowing for the private ordering of reproduction. In either alternative A or B, the Act tries to ensure that a child has two parents. The Act also provides for a court-ordered home study of the intended parents and the surrogate, and stipulates that the parties meet certain standards for the contract to be valid. With respect to the protection of private ordering, the Act contains provisions that protect the surrogate from exploitation: it provides that counsel be appointed for the surrogate, and the court findings required seek to protect her from overreaching or fraud. The Act also requires the Court to find that the surrogate has already had one pregnancy, presumably to make sure she is aware of the emotions arising from the experience.

USCACA also addresses the substantive fairness of the surrogacy agreement. It requires that the commissioning parents pay health care costs for the surrogate up to birth, and also any attorney or court fees incurred in a suit against them. Finally, it requires that the agreement not be “substantially detrimental to the interest of any of the affected individuals.”
USCACA met with little acceptance, and in 2000, NCCUSL replaced it with the Uniform Parentage Act (UPA), which adopted Option A, that surrogate contracts were valid and enforceable if first approved by a court, and it allowed payment to surrogate mothers. The UPA described the carrier as the "gestational mother," a term that acknowledges her maternal role if not legal maternal status.

B. The Model Assisted Reproductive Technologies Act

The American Bar Association (ABA) put forth the Model Assisted Reproductive Technologies Act (MARTA). MARTA, like USCACA, offers two alternatives with respect to surrogacy contracts, but in this case, both alternatives assume valid contracts. Alternative A provides that such contracts are valid if a court issues an order validating the contract upon a finding that: the relevant social welfare agency completed a home study of the intended parents, that the parties entered into the agreement voluntarily and knowingly, made reasonable provisions for the health care expense of the gestational carrier and the child, and that the consideration paid to the gestational carrier is reasonable. Upon an order validating the contract, the intended parents are deemed to be the parents of the child and the surrogate is deemed to have relinquished all parental rights. Alternative B defers to private ordering: rather than requiring a court order, it provides that surrogacy contracts are valid if they meet the requirements set out in section 703, which are more detailed than those in Alternative A. Alternative B also requires that one of the intended parents must have donated a gamete to the gestating carrier; thus B defines the gestational arrangement carrier as "the process by which a woman attempts to carry and give birth to a child created by in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational carrier has made no genetic contribution." The contract is then valid when the attorneys representing both parties file forms certifying that the contract was entered into validly under the Act. Like Alternative A, B stipulates that, once the formalities are carried out, the intended parents are the legal parents of the child. The ABA Act refines the motherhood terminology further by referring to the carrier as the "gestational carrier." The risk in this definition, however, is that it may lead to confusion based on prior case law, discussed above, in failing to distinguish between partial and complete surrogacy. As of now, no state has adopted the ABA Model Act.

48. MARTA Section 702.
49. Id. Section 701.
50. Id. Section 703.
51. Id. Section 102.
52. Id. Section 705.
53. Id. Section 705.
Unsurprisingly, surrogacy contracts have given rise to lawsuits over the years. A surrogate mother sued Noel Keane, the attorney who had popularized surrogacy contracts, for violation of 1) the 13th Amendment’s prohibition on slavery or involuntary servitude; 2) the 14th Amendment’s guarantees of Due Process and Equal Protection, 3) 42 U.S.C. 1981 for deprivation of Equal Protection and Due Process; and 4) conspiracy to deprive her of her rights as a member of a protected class. The Court dismissed all of these claims, chiefly for lack of state action; it rejected the argument that the state of Michigan’s failure to ban surrogacy contracts converted private action into state action. Making an observation important for future actions of this kind, the Court noted that “the exercise of a choice allowed by state law, where the initiative comes from a private actor and not from the state, cannot make a private act a state act for the purposes of the Fourteenth Amendment.” Further, with respect to the requirements for class membership under 1985(3), the Court found that the class of surrogate mothers, of which the plaintiff claimed to be a member, did not qualify as one of the classes of “discrete and insular minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics.” The Court noted that the plaintiff’s membership in the class of surrogate mothers was based solely on her conduct and not on her inherent characteristics.

Another type of lawsuit arising from surrogacy contracts involves potentially foreseeable harm to the resulting child, either harm inflicted by the parents or foreseeable physical or mental defects. An example of the first is Huddleston v. Infertility Center of America, Inc., in which a surrogate brought a wrongful death and survival action against the fertility clinic (operated by attorney Noel Keane) when the sperm donor father’s abuse led to the death of the child to whom she had given birth. The plaintiff sued the clinic on theories of negligence, breach of fiduciary duty, negligent infliction of emotional distress, and fraud. The trial court dismissed the plaintiff’s petition, but the appellate court reversed, holding that that “a business operating for the sole purpose of organizing and supervising the very delicate process of creating a child, which reaps handsome profits from the endeavor, must be held accountable for the foreseeable risks of the surrogacy undertaking because a special relationship ex-

55. Id. at 220.
56. Id. at 220-221.
57. Id. at 221 (W.D. Mich. 1987) (internal citations omitted).
58. Id.
60. Id.
ists between the surrogacy business, its clients, and, most especially, the child which the surrogacy undertaking creates. The Court went on to hold that child abuse was a foreseeable risk of the surrogacy undertaking, observing that many states had laws requiring psychological testing for putative surrogates and commissioning parents, both to ensure that the surrogate would be emotionally able to give up the child, and that the child would be raised in a stable and loving home. The Court did, however, reject the claim that the clinic owed the surrogate a fiduciary duty, finding no legal authority to support the assertion, and it also rejected the surrogate's claim for negligent infliction of emotional distress because she was not present when the abuse occurred.

In its analysis, the Huddleston Court cited to the earlier case of Stiver v. Parker, et. al., in which a surrogate sued the broker (again, Noel Keane), another attorney, and several doctors when the child she gave birth to was diagnosed with cytomegalic inclusion disease, which caused him to have severe hearing loss, mental retardation, and neuro-muscular disorders. It turned out that Stiver's husband was actually the baby's father, but the child's condition was caused by exposure to a virus present in the sperm donor's sperm. Reversing the District Court, the Sixth Circuit found that the defendants owed the plaintiffs an affirmative duty to protect them against harm, and remanded for a jury finding as to whether they had breached that duty. The Court explained that the duty was "marked by a heightened diligence" because the defendants were "engaged in the surrogacy business and expected to profit thereby." Having established the existence of a duty, it noted that, although the contracts the parties signed required them to be tested for a variety of venereal and other diseases, there was no mechanism in place to ensure that such testing was done, and, in fact, the artificial insemination occurred without any prior tests on the sperm donor's semen, or on the health of the surrogate. This lack of a program to protect the parties, the Court, concluded, raised a jury question as to whether the operation was conducted "in disregard to the foreseeable risks of harm." Thus, the trend is for surrogacy brokers, doctors, and clinics to be held liable for breaches of the duty to protect the parties from foreseeable harms. Those foreseeable harms include harm to the

61. Id. at 460.
62. Id. at 461.
63. Id.
64. Stiver v. Parker, et. al., 975 F.2d 261, 263 (6th Cir. 1992).
65. Id. at 273.
66. Id. at 268
67. Id.
68. Id.
child through the transmission of disease, and of abuse inflicted by the commissioning parents.

**Conclusion**

In sum, then, the law of surrogate motherhood in the United States is in a state of flux and confusion. States have widely differing laws, some enforcing surrogacy contracts, some banning them entirely, and some allowing them under certain circumstances. Many states have no laws regarding surrogacy contracts at all. No single statutory regime has won widespread acceptance. As a result, courts are often left to decide parenthood disputes arising from these contracts, and have a range of theories by which to do so. It is clear, however, that surrogacy will remain a viable choice for infertile couples, and even individuals who wish to have offspring and face physical impediments to doing so. It is regrettable that more state legislatures have not addressed the legal issues involved.